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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 791

IRENEE DU PONT, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Petition	1
Question presented	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	5

CASES CITED

Heiner v. Donnan, 285 U. S. 312 7
Hoeper v. Tax Commission, 284 U. S. 206 ..... 6, 7
Pillsbury v. Commissioner, Court of Appeals, District of Columbia, No. 5407 5
Wells v. Commissioner, 62 Fed. (2d) ...., C. C. A. 8th, February 4, 1933 ..... 5, 6

OTHER AUTHORITIES CITED

47 Harvard Law Review 896 5

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PETITION[1]

The undersigned, on behalf of Irenee du Pont, of Granogue, Delaware, respectfully prays that a writ of certiorari issue to review the final decree of the Circuit Court of Appeals for the Ninth Circuit, entered January 6, 1933, in a proceeding therein entitled *Irenee du Pont* v. *Commissioner of Internal Revenue,* No. 4620, affirming a decision of the United States Board of Tax Appeals rendered August 7, 1930, which determined deficiencies in petitioner's income taxes for 1924, 1925 and 1926.

[1] Counsel for respondent have advised that this petition will not be opposed, since the Government is filing a similar petition in a similar case, decided against it.

QUESTION PRESENTED

Whether section 219(h) of the Revenue Acts of 1924 and 1926 is unconstitutional as applied to a case where the grantor created an irrevocable trust for the payment of premiums on policies of insurance upon his life and parted with all rights and benefits under such trust and under the insurance policies prior to the enactment of said section of the Revenue Acts.

STATEMENT[1]

"The petitioner, under date of September 18, 1923, executed nine trust agreements for the benefit of his wife, their nine children, and other members and relatives of his family. These trusts were irrevocable for their duration, which was in the first instance until December 18, 1926, with provision for further extension upon notice by the trustor to the trustee. Two such notices have been given and the trusts have been extended to December 18, 1932.

"By the trust agreements, the petitioner transferred to the Wilmington Trust Company, as trustee, the following properties:

(a) Thirty-two insurance policies on the petitioner's life.
(b) Eight hundred and thirty shares of 7 per cent preferred stock of the Christiana Securities Company, a corporation existing under the laws of the State of Delaware.

"The nine trust agreements were in full force and effect during the years 1924-1926 inclusive, and the 32 insurance policies were likewise in full force and effect

[1] As stated in the Board of Tax Appeals' findings.

and held under the terms of the trust during those years.

"The transfer of the insurance policies was absolute and complete. By the trust instruments the trustee was made the owner of such policies and, if the trusts terminated prior to the petitioner's death, all interest in the policies would vest in certain named beneficiaries. The petitioner is not one of such beneficiaries.

"If the petitioner dies prior to December 18, 1932 (or such other date to which the trusts might further be extended), the proceeds of the life insurance policies are to become a trust fund in the hands of the trustee, designated as the Primary Trust Fund. The net income therefrom and the fund itself would be distributed and paid over to named beneficiaries, other than the petitioner or his estate, as indicated in the trust agreements.

"The petitioner retains no right to change the beneficiaries under the insurance policies named in the trust agreements. He has no right to surrender the policies for the surrender values indicated therein, nor to borrow against them. There is no provision under which title to the policies could revest in the taxpayer either at his own discretion or that of him co-jointly with anybody else.

"As to the shares of stock transferred under the trust agreements, the trustee receives the income from the securities, applies the same to the payment of taxes, governmental charges, and incidental expenses including the commissions, and uses the balance of the income for the payment of premiums on the policies of life insurance for the period of the trusts, or so long as the petitioner lives, whichever is the shorter.

"If the trusts terminate prior to the petitioner's death, the securities and any income not paid out, all of which is designated the Secondary Trust Fund, are

to be transferred to the petitioner. If the petitioner dies prior to the end of the trusts, the securities and any net income thereon are to be distributed to the nine children or their issue in the manner specified therein. No part of the Secondary Trust Fund in such case, goes to the petitioner's estate.

"Such is the combined substantive effect of the provisions of the nine trust agreements. To simplify the description of the separate interest of each child dependent upon contingencies, nine distinct trusts (each applying to a one-ninth share in the trust funds) are provided for.

"During the year 1924 dividends from securities transferred to and held by the Wilmington Trust Company as trustee, amounting to $50,422.40, were received by such trustee and, pursuant to the terms of the trusts, were used to pay insurance premiums. During the year 1925 dividends amounting to $50,370.10 and during the year 1926 dividends amounting to $50,422.40 were so received and applied. These amounts have been treated by the Bureau as income taxable to the petitioner and subject to income taxes and surtaxes under the Revenue Acts of 1924 and 1926. This action is based upon the Commissioner's interpretation of section 219(h) of the Revenue Acts of 1924 and 1926.

"The petitioner's wife and all the children beneficiaries of the trust, were living during the years 1924 and 1926, and are still living."

Specification of Errors To Be Urged

The Circuit Court of Appeals erred:

1. In failing to hold the petitioner was not taxable on the dividends received and applied by the trustee to pay insurance premiums pursuant to the terms of the trusts.

2. In failing to hold section 219(h) of the Revenue Acts of 1924 and 1926 unconstitutional as applied to the facts of this case.
3. In failing to reverse the decision of the United States Board of Tax Appeals which decided the case against the petitioner and to remand the case to such Board of Tax Appeals with instructions to enter a decision finding no deficiency in petitioner's income taxes for the calendar years 1924, 1925 and 1926.

Reasons for Granting the Writ

I.

This is one of two test cases (the other being *Wells* v. *Commissioner of Internal Revenue,*[1]) involving a question of considerable public importance which should be settled. Counsel for petitioner knows of twenty cases pending before the Bureau of Internal Revenue on claims for refund, ten cases pending in the Board of Tax Appeals,[2] two cases in the Court of Claims,[3] one case in the Court of Appeals of the District of Columbia[4] as well as the *Wells* case, *supra,* that are dependent upon an ultimate decision of this question. When it is further considered that during the years 1923-1930 inclusive, there was over $4,000,000,000[5] worth of trustee insurance in this country, it seems

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[1] 62 Fed. (2d) ...., C. C. A. 8th, Feb. 4, 1933.
[2] Docket Nos. 41367, 41369, 41370, 46323, 45490, 54279, 60549, 62763, 68377, 69880.
[3] The cases are:
(1) Cummins v. United States, L-337.
(2) Thacher v. United States, L-436.
[4] *Pillsbury* v. *Commissioner*, No. 5407.
[5] 47 Harvard Law Review 896.

highly probable that a great many of these trusts must be affected by the constitutional question involved in this case.

Consequently, until this Court reviews and decides this question of constitutional law, the taxpayers, the Government and lower courts will be in confusion on the subject.

II.

As the Solicitor General has recognized in his petition for certiorari in the *Wells* case, there is a direct conflict in the *ratio decidendi* of the opinions of the Circuit Court of Appeals for the Third Circuit in this case and of the Circuit Court of Appeals for the Eighth Circuit in the *Wells* case.

In the *Wells* case, the court, on the authority of *Hoeper* v. *Tax Commission,*[1] held that since the taxpayer during the taxable years had no ownership of the income he could not be subjected to a tax thereon.

In this (*du Pont*) case, although a similar state of facts existed, the Circuit Court of Appeals avoided the decision in *Hoeper* v. *Tax Commission,* distinguishing it upon the ground that Mr. Hoeper had never owned the corpus from which the taxed income was derived, while Mr. du Pont had at one time owned the corpus.

The Circuit Court of Appeals for the Eighth Circuit based its decision on the *present* legal right to the income. The Circuit Court of Appeals for the Third Circuit based its decision upon *past* rights, which had terminated prior to the enactment of the taxing act.

The obiter language of the Circuit Court in the *Wells* case to the effect that they would have reached the same conclusion as the Third Circuit in the *du*

[1] 284 U. S. 206.

Pont case, was written by the court without any examination of the record in the *du Pont* case and without the benefit of arguments of counsel or examination of briefs. This obiter language is obviously in conflict with the judgment in the case the court was deciding.

III.

It is submitted that the decision of the Third Circuit Court of Appeals in this case is in conflict with the decisions of this Court in *Hoeper v. Tax Commission, supra, and Heiner* v. *Donnan.*[1] The lower court in this case said:

> "While he has neither power over, nor title to, the fund nor a direct financial interest in the insurance policies * * *."

Certainly this is a finding by the court that the petitioner did not own the income produced by the trust corpus[2]—a finding that is justified by the facts of the case. The decision, therefore, is necessarily in conflict with the decisions of this Court in the two above mentioned cases where it was held that A cannot constitutionally be taxed on the income of B. The fact that the corpus may revert to the petitioner cannot justify a distinction between this case and the *Hoeper* case. Suppose A should lease his land to B for three years for a rental of $3,000 which was paid at the time of making the lease. B during that three years raised crops which he sold for a $10,000 profit. Can it be

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[1] 285 U. S. 312.

[2] Note that the court's opinion is obviously inconsistent for while they have in effect found by this statement that the income of the trust did not belong to the petitioner, yet later in the opinion the court states,

"Since it is income to the grantor * * *."

said that A can be taxed on B's profit because at the end of the lease A will receive back the corpus from which the profit was produced?

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit be granted.

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